No. 82-1616

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

WEBER AIRCRAFT CORPORATION, ET AL.,

RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF INDERJIT BADHWAR AND DONALD J. GOLDBERG AS AMICI CURIAE IN SUPPORT OF AFFIRMANCE

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QUESTION PRESENTED

Are witness statements containing solely factual matter, which were made during a Governmental investigation into an air crash, and which were not prepared by attorneys or in anticipation of litigation, exempt from disclosure under Exemption 5 of the Freedom of Information Act, 5 U.S.C. § 552(b)(5)?

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BRIEF OF INDERJIT BADHWAR AND DONALD J. GOLDBERG AS AMICI CURIAE

Messrs. Inderjit Badhwar and Donald J. Goldberg, with the consent of the parties, submit this Brief as Amici Curiae in support of Respondents.

INTEREST OF INDERJIT BADHWAR AND DONALD J. GOLDBERG

Messrs. Badhwar and Goldberg are journalists on the staff of nationally syndicated columnist Jack Anderson. They are investigating the military's aircraft accident investigation program, and are focusing on such questions as: Why is the Air Force accident rate so much higher than the civilian accident rate? Has the military's practice of conducting its accident investigations in secret, and maintaining most portions of its accident reports secret, enhanced or detracted from aviation safety? Particularly since the National Transportation Safety Board conducts its investigations of civil aircraft accidents in public, and makes its accident reports public, is there any justification for the military's practice of secrecy?

Messrs. Badhwar and Goldberg have been frustrated in their attempts to obtain through the Freedom of Information Act pertinent information and documents, including witness statements such as those at issue in this case, because of the interposition of Exemption 5 and the asserted "privilege" advanced by Petitioner herein. The Air Force has been using Exemption 5 and the asserted "privilege" not only to shield witness statements, but also to prevent disclosure of voluminous other data relating to accident investigations, including recommendations for corrective action contained in the final reports of investigations, and information reflecting whether such recommendations were implemented. Messrs. Badhwar and Goldberg will soon institute an action in the United States District Court seeking the

information that has been withheld from them.

The parties to this case necessarily must focus upon the facts and the law in the context of their own interests and the particular circumstances of this case. But the question of the extent to which purely factual witness statements involving military air crashes, not taken by attorneys or in anticipation of litigation, are available to the public implicates interests transcending the specific and narrow interests of Petitioner and Respondents in this litigation. Although the propriety of the Government's broad assertion of "privilege" and its use of Exemption 5 to shield many elements of military air crash investigations, including the final reports of military safety investigation boards, is not before this Court, a

ruling sustaining Petitioner's assertion of privilege with respect to witness statements might be relied upon by the Government in defense of its broader assertion of privilege. Since different legal issues are involved, that reliance would be misplaced. Nonetheless, Amici Curiae seek to avoid that result not only because they believe the decision below was correctly decided, but also because acceptance of the Government's broad assertion of privilege would substantially hinder the free flow of information on the readiness of the Nation's military personnel, the quality of its equipment, and the manner in which military commanders investigate aircraft mishaps occurring under their command -- all matters of grave public concern.

When it enacted the Freedom of Information Act, Congress placed high

regard upon the role of journalists to obtain and report the public's information to the Nation. See Renegotiation Board v. Bannercraft Clothing Co., 415 U.S. 1, 17 (1974). It highlighted the Act's value to "the conscientious newspaperman who was seeking material for a serious article that he is preparing on the operations of a particular agency of Government." 112 Cong. Rec. 13658 (1966) (remarks of Rep. Anderson); see also id. at 13648 (remarks of Rep. Pucinski). Congress emphasized the need, even after passage of the Act, for the continuing vigilance of the press, the public, and the Congress. Id. (remarks of Rep. Laird). Messrs. Badhwar and Goldberg appear as Amici Curiae in this case with those responsibilities.

SUMMARY OF ARGUMENT

A. This Court has held that purely factual documents like the witness statements at bar are not exempt from disclosure under the Freedom of Information Act ("FOIA") by Exemption 5. EPA v. Mink, 410 U.S. 73, 86-89 (1973). Congress' intent that such factual materials not be within Exemption 5 is clear from the carefully developed legislative history, including discussion particularly directed to the release of witness statements.

B. Petitioner urges a construction of legislative history that may not be reconciled with this Court's analysis of the same history in Mink. 410 U.S. at 90-91. It rests its entire argument upon a brief clause taken out of context in a Senate Report, which was not specifically directed to Exemption 5 at all. Its

argument ignores the balance and principal thrust of the legislative history commending the release of purely factual material, and if accepted, would mean that every suggestion or criticism of FOIA made in Congressional Hearings should be read into the Act. Such a broadening of FOIA's Exemptions, by implication, may not be squared with clear Congressional intent that the Act be viewed as a disclosure statute, and that its exemptions be narrowly construed so that there are clearly defined "workable standards" for applying them.

C. Petitioner seeks a special exemption for a select class of documents -- witness statements not taken by attorneys or in anticipation of litigation, but for military air crash safety investigations. Under the case law as of the enactment of FOIA, such

statements as those at bar were subject to discovery and "[w]e must assume . . . that Congress legislated against the backdrop of this case law." Mink, supra, 410 U.S. at 89. Generally, witness statements not taken in anticipation of litigation are available in discovery and through FOIA. These witness statements should not be accorded special treatment.

D. The National Transportation Safety Board has responsibilities, for civil aviation, that are identical to military air crash safety investigation boards. The NTSB conducts its investigations in public, and routinely makes its witness statements available. Its record of assuring air safety is far better than that of the military safety boards. Actual practice thus refutes Petitioner's claim that safety investigations best proceed in secret and that witness

statements must be withheld from the public.

E. The better view of the law is that no special protection should extend to these documents. At the very least, however, the Record in this case is inadequate to warrant this Court's adoption of a special privilege, as Petitioner urges, to exempt these witness statements from FOIA. Many questions, including such basic ones as whether these witnesses were actually promised confidentiality, and how the Air Force could square promises of confidentiality with its own Regulations permitting disclosure in certain circumstances (including as required by FOIA), remain to be answered in a full hearing. Thus, if the Court disagrees with our position that the asserted "privilege" is not within Exemption 5, and further disagrees

with our position that there can be no justification for such a special privilege, it should remand this case so that a proper Record, testing the asserted basis for the privilege, may be made.

ARGUMENT

WITNESS STATEMENTS CONTAINING SOLELY FACTUAL MATTER, WHICH WERE MADE DURING A GOVERNMENTAL INVESTIGATION INTO AN AIR CRASH, AND WHICH WERE NOT PREPARED BY ATTORNEYS OR IN ANTICIPATION OF LITIGATION, ARE NOT SHIELDED FROM DISCLOSURE UNDER EXEMPTION 5 OF THE FREEDOM OF INFORMATION ACT.

The law of FOIA is familiar. The statute is a disclosure statute. E.g., Chrysler Corp. v. Brown, 441 U.S. 281, 290 & n.10 (1979); see also 112 Cong. Rec. 13654 (1966) (remarks of Rep. Rumsfeld).1/ Its exemptions "must be

1/ "It is our intent that the courts interpret this legislation broad- (footnote continued)

narrowly construed" and "do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act." Department of Air Force v. Rose, 425 U.S. 352, 361 (1976). Congress crafted the statute with specificity in order to provide concrete, "workable standards" for determining when information must be released. See, e.g., FTC v. Grolier, Inc., 462 U.S. ___, 103 S.Ct. 2209, 2214-2215 (1983); EPA v. Mink, 410 U.S. 73, 79 (1973); S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965) ("Senate Report"); H.R. Rep. No. 1497, 89th Cong., 2d Sess. 6, 1966 U.S. Code Cong. & Ad. News 2418, 2423.

(footnote continued from previous page)
ly, as a disclosure statute and not as an excuse to withhold information from the public."

Representative Rumsfeld was one of the sponsors of the bill that became FOIA and was a member of the House Committee that had studied the bill and reported it favorably.

Exemption 5 of FOIA, 5 U.S.C. § 552(b)(5), exempts from mandatory disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency." This Court has consistently applied this Exemption in conformity with the guiding principles underlying FOIA. As recently as last Term this Court stated, "In keeping with the Act's policy of 'the fullest responsible disclosure,'. . . Congress intended Exemption 5 to be 'as narrow[] as [is] consistent with efficient Government operations.'" Grolier, supra, 103 S.Ct. at 2212 (citing legislative history). The Court has expressed uncertainty that Exemption 5 "was intended to incorporate every privilege known to civil discovery," Federal Open Market Committee v. Merrill, 443 U.S. 340, 354 (1979), and

has looked to legislative history to determine whether a privilege asserted to be embraced by Exemption 5 may fairly be said to have been within Congressional intention at the time the statute was passed. See id. at 354-360. "[A] claim that a privilege other than executive privilege or the attorney privilege is covered by Exemption 5 must be viewed with caution," id. at 355, and must be consistent with the "primary purpose" of Exemption 5 "to enable the Government to benefit from 'frank discussion of legal or policy matters.'" Grolier, supra, 103 S.Ct. at 2212 (citing legislative history); see also FBI v. Abramson, 456 U.S. 615, 630 (1982) ("purposes behind Exemption 5 [are] protecting the give-and-take of the decisional process").

Petitioner makes no claim that the documents at issue are protected by

"executive privilege or the attorney privilege"; instead it seeks to extend Exemption 5 to reach documents that contain the kind of "purely factual, investigative" matter that this Court held in EPA v. Mink, supra, 410 U.S. at 86-91, was not within the purview of Exemption 5. The documents at bar do not embody "legal or policy matters" at all; they are merely raw witness statements, reciting facts, that concededly were prepared neither by attorneys nor in anticipation of litigation.

Petitioner asks this Court either to distort legislative history to rationalize the implied existence of a special privilege for a select group of factual documents, or to abandon the approach of Mink and Merrill and make Exemption 5 boundless. To adopt either of Petitioner's views would create uncertainty

with respect to the scope of Exemption 5. Instead of providing a workable standard, it would make the exemption an open-ended source of protection for factual documents generated in the course of Governmental investigations. The Court of Appeals properly rejected Petitioner's contentions, and its decision should be affirmed.

I. CONGRESS INTENDED THAT PURELY FACTUAL WITNESS STATEMENTS NOT BE EXEMPT FROM DISCLOSURE UNDER EXEMPTION 5.

A. This Court Has Clearly Held That Purely Factual Documents Of This Kind Are Not Within Exemption 5.

Ten years ago this Court studied the legislative history of Exemption 5, and its relationship with the kind of factual documents at issue here, and unequivocally concluded that such documents were not included within the Exemption:

"[T]he legislative history of Exemption 5 demonstrates that Congress intended to incorporate generally the recognized rule that 'confidential intra-agency advisory opinions . . . are privileged from inspection.'

* * *

"But the privilege that has been held to attach to intragovernmental memoranda clearly has finite limits, even in civil litigation. . . . [M]emoranda consisting only of compiled factual material or purely factual material contained in deliberative memoranda and severable from its context would generally be available for discovery by private parties in litigation with the Government. . . . We must assume, therefore, that Congress legislated against the backdrop of this case law, particularly since it expressly intended 'to delimit the exception [5] as narrowly as consistent with efficient Government operation.' . . . Virtually all of the courts that have thus far applied Exemption 5 have recognized that it requires different treatment for materials reflecting deliberative or policy-making processes on the one hand, and purely factual, investigative matters on the other.

"Nothing in the legislative history of Exemption 5 is con-

trary to such a construction." Mink, supra, 410 U.S. at 86-89 (emphasis added; footnotes omitted).

B. Pertinent Legislative History Illustrates Congress' Clear Intent That Purely Factual Witness Statements Not Be Shielded By Exemption 5.

S.1160, the bill that was enacted as FOIA in 1966, was "based" on a prior Senate bill, S.1666, passed by the Senate in July 1964. Senate Report 4.[2/] The Senate Report accompanying S.1666, when describing Exemption 5, declared, "All factual material in Government records is to be made available to the public . . . ." S. Rep. No. 1219, 88th Cong., 2d Sess. 7 (1964) (emphasis in original). In further discussing Exemp-

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2/ S.1666 was passed by the Senate, but insufficient time remained in the Eighty-Eighth Congress for its consideration by the House. It was reintroduced in the Eighty-Ninth Congress as S.1160. Senate Report 4.

tion 5, the Report states, "[I]t will be noted that there is no exemption for matters of a factual nature." Id. at 14.

When S.1666 was discussed on the Senate floor, Senator Dirksen spoke in favor of the bill and noted how it would remedy one particular example of "departmental and agency abuse" involving the failure to disclose witness statements. 110 Cong. Rec. 17088-17089 (1964) (remarks of Sen. Dirksen). He related the story of a farmer who had been told by the Department of Agriculture that his acreage allotment was being reduced because of certain information against him. When he, and later Senator Dirksen, tried to determine from the Department what this information was, the Department advised them that the information was contained in witness statements that had been given "on a confidential basis" and

thus could not be released. Passage of S.1666, Senator Dirksen concluded, was an "essential step" to avoid this kind of abuse. The bill passed the Senate. Id. at 17089.

Later in July 1964, the Senate reconsidered S.1666 at the request of Senator Humphrey, who stated that "additional clarification would be helpful." 110 Cong. Rec. 17667 (1964) (remarks of Sen. Humphrey). He stated that he had "prepared certain amendments which would . . . assist in clarifying these sections," but that it might "be possible to accomplish the objective of removing these potential ambiguities or uncertainties through a more complete exposition of the committee's intention without actually having to amend S.1666." Id. Senator Humphrey expressed concern that, as Exemption 5 was then written, it would

not exempt memoranda prepared by agency employees giving their evaluation of the credibility of evidence obtained from witnesses or other sources, and memoranda "summarizing facts used as a basis for recommendations for agency action." Id. Senator Humphrey suggested an amendment changing the language of the Exemption so that it would exempt "intra-agency or interagency memorandums or letters dealing with matters of fact, law or policy." Senator Long, the sponsor of S.1666, stated that this proposal was unacceptable, because:

> "The suggestion with respect to [Exemption 5], adding 'matters of fact' to 'matters of law or policy' would result in a great lessening of information available to the public and to the press." Id. (remarks of Sen. Long).

Senator Long further clarified that:

> "[The documents described by Senator Humphrey lead] me to point out that there is nothing in this bill which would over-

> ride normal privileges dealing with the work product and other memorandums summarizing facts used as a basis for recommendations for agency action if those facts were otherwise available to the public." Id. at 17667-17668.3/

The Senate did not accept Senator Humphrey's proposed change to Exemption 5, and the bill passed the Senate a second time, without any pertinent change. Id. at 17668.

C. Petitioner Misreads Legislative History To Assert That Exemption 5 Embraces Purely Factual Witness Statements.

As originally introduced in the Eighty-Eighth and Eighty-Ninth Congresses, the bills that ultimately became FOIA, S.1666 and S.1160, contained an exemption for "inter-agency or intra-

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3/ We reiterate that the witness statements at bar are not asserted to be deliberative material within an "executive privilege" or work product prepared in anticipation of litigation.

agency memorandums or letters dealing solely with matters of law or policy." S. Rep. No. 1219, 88th Cong., 2d Sess. 17 (1964) (S.1666; emphasis added); Senate Report 1 (S.1160; emphasis added). After the House and Senate Hearings, Exemption 5 was changed to substantially its present form. See Mink, supra, 410 U.S. at 89-91. Petitioner argues broadly that "it may reasonably be inferred that one of the suggestions that precipitated [this change in Exemption 5] concerned the Machin privilege" for witness statements taken in military air crash safety investigations (Pet. Br. 26). The argument fails for several reasons.

1. This Court Held In Mink That Congress Changed The Language Of Exemption 5 For A Specific Reason Different From What Petitioner Contends.

After studying the pertinent history, this Court concluded in Mink that Congress changed Exemption 5's language to accommodate one particular criticism that had nothing to do with the asserted "Machin privilege" for purely factual witness statements.

> "The [prior] formulation was severely criticized . . . on the ground that it would permit compelled disclosure of an otherwise private document simply because the document did not deal 'solely' with legal or policy matters. Documents dealing with mixed questions of fact, law, and policy would inevitably, under the proposed exemption, become available to the public. As a result of this criticism, Exemption 5 was changed to substantially its present form." Mink, supra, 410 U.S. at 90-91 (emphasis added).

This particular criticism appeared numerous times in the testimony of several persons. See, e.g., Administrative Procedure Act: Hearings Before the Subcomm. on Administrative Practice and Procedures of the Senate Comm. on the Judiciary, 89th Cong., 1st Sess. 36, 205, 236, 366-367, 383, 406-407, 417, 437, 445-446, 450, 490 (1965) ("Senate Hearings"); Federal Public Records Law: Hearings Before the Subcomm. of the House Comm. on Government Operations, 89th Cong., 1st Sess. 27, 208, 220, 224, 229-230, 256 (1965) ("House Hearings"). As the Court found, the change was intended to reach documents containing mixed questions of fact, law, and policy, where factual matter is "inextricably intertwined" with legal or policy matter. It was not intended to shield purely factual matter such as the witness statements at issue. See Mink, supra, 410 U.S. at 91-92.

2. Petitioner's Argument Rests Solely Upon A Solitary Phrase In The Legislative History, Taken Out Of Context, In Disregard Of The Balance And Principal Thrust Of That History And The Congressional Intent It Reflects.

a. Petitioner rests its argument solely upon a brief passage from the Senate Report stating that the change discussed above "'reflect[ed] suggestions made to the committee in the course of the hearings.'" (Pet. Br. 26). This excerpt has been taken out of context, and is quoted in full below. It appeared in an introductory section of the Senate Report that discussed past FOIA bills; it did not appear in the portion of the Report explaining Exemption 5, or indeed in any portion of the Report discussing the substantive provisions of FOIA. The last paragraph of the introductory

section of the Senate Report, entitled "History of Legislation," reads:

> "In the last Congress, the Senate passed S.1666, upon which this bill [S.1160] is based, on July 31, 1964, but sufficient time did not remain in that Congress for its full consideration by the House. The present bill is substantially S.1666, as passed by the Senate, with amendments reflecting suggestions made to the committee in the course of the hearings." Senate Report 4.

This cryptic comment can hardly support the notion that Congress intended, through the use of only a general introductory statement not dealing with Exemption 5 or any substantive portion of the bill, to change the force of extensively developed legislative history and make purely factual, investigative witness statements exempt from disclosure by Exemption 5. See Department of State v. Washington Post Co., 456 U.S. 595, 600 (1982) ("[p]assing references and

isolated phrases are not controlling when analyzing a legislative history"). Fairly read, this general introductory language means only that the revised version of the Senate bill reflected certain suggestions made in the course of the Hearings. Obviously the amended Senate bill reflected some suggestions; as noted above, the reason for the change in the language of Exemption 5 was the concern voiced during the Hearings that otherwise-exempt material would have to be released merely because it did not deal "solely" with law and policy. To read this language, as Petitioner urges, to mean that each and every suggestion made to the Senate Committee during the course of the Hearings may "reasonably be inferred" to be incorporated in FOIA is at war with the specificity with which Congress drafted the statute, with the

expressed Congressional intent that FOIA's Exemptions be narrowly construed, and with Congress' desire that there be concrete "workable standards" for the sound administration of the Act. Such a construction is no less objectionable than the construction, rejected by this Court in Mink, that the change in Exemption 5's language should be read as providing that all factual material is exempt from disclosure. Mink, supra, 410 U.S. at 91.

b. The flaws of Petitioner's position are further evident when some of the "suggestions" made in the Hearings are recounted. The recurring theme among the Executive departments and agencies was opposition to FOIA.4/ For example, the

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4/ Indeed, Congress noted that, even after the Hearings and "a carefully prepared report -- which clarifies legislative intent . . . [t]here still remains some opposition on the part of a (footnote continued)

Interstate Commerce Commission urged that "all internal memorandums be withheld from disclosure." Senate Hearings 244. The Federal Communications Commission urged that Exemption 5 should include all inter-agency or intra-agency memorandums or letters that did not fall "within one of the categories of agency records required to be published or disclosed by some other provision of this Act." Id. at 459. Indeed, Assistant Attorney General Norbert A. Schlei, who was the principal spokesman for the Executive Branch and whose testimony is relied upon by Petitioner (Pet. Br. 27-28), did not limit his comments to the so-called "Machin privilege" for witness statements

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(footnote continued from previous page) few Government administrators . . . ." 112 Cong. Rec. 13653 (1966) (remarks of Rep. Rumsfeld). This continued opposition, of course, is a further refutation of Petitioner's argument that all "suggestions" made at the Hearings were heeded by Congress.

taken in military air crash safety investigations, but urged the existence of a broad privilege "in any case where disclosure would hamper an important governmental function." House Hearings 220. It could not seriously be contended that any of these suggestions became the law. That a "privilege" to protect witness statements was mentioned during the Hearings similarly cannot, ipso facto, serve to incorporate that privilege into Exemption 5.

c. Further illustrating the weakness in Petitioner's argument that Exemption 5 should be extended by implication (or Congressional silence) is the fact that the references in the Hearings to witness statements such as those at bar do not appear in Exemption 5 contexts at all. Most of the references cited by Petitioner were made in the course of

criticizing the Senate's formulation of Exemption 7.5/ See Senate Hearings 417-418 and House Hearings 220 (Department of Defense); Senate Hearings 206 (Assistant Attorney General Schlei); Senate Hearings 366-367 and House Hearings 237 (Civil Aeronautics Board). Other references do not mention any Exemption at all. See Senate Hearings 418 (Department of Defense); Senate Hearings 196 (Assistant Attorney General Schlei). A number of the comments that Petitioner cites do not even specifically mention witness statements made in the course of air

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5/ Exemption 7 clearly does not apply to the witness statements at bar, since the statements were not taken for law enforcement purposes, but rather were taken as part of an investigation the "sole purpose" of which "is to determine the cause of the accident and to develop corrective measures to prevent similar mishaps in the future" (Pet. Br. 3). See FBI v. Abramson, 456 U.S. 615, 622 (1982); Church of Scientology v. Dep't of Army, 611 F.2d 738, 748 (9th Cir. 1980). Petitioner acknowledges as much (Pet. Br. 30).

crash accident investigations. See, e.g., Senate Hearings 206 (Assistant Attorney General Schlei). In short, none of the comments cited by Petitioner fairly supports the notion that Congress intended witness statements of the type involved in this case to be covered by Exemption 5.

D. Under The Case Law As Of The Enactment Of FOIA, The Witness Statements At Bar Were Subject To Discovery.

Petitioner's strained view of the legislative history is further demonstrated by the pertinent case law as of the enactment of FOIA in 1966. We have found no reported decision as of the passage of FOIA that would have shielded the witness statements at bar from discovery. It is simply illogical to imply a Congressional intendment that

these statements be embraced by Exemption 5, when all judicial authority available to Congress would not have viewed these statements as "not routinely available" in litigation. Simply put, as of the passage of FOIA, these statements were available to litigants, and "[w]e must assume . . . that Congress legislated against the backdrop of this case law." Mink, supra, 410 U.S. at 89.

1. The Reynolds Case.

A typical example of the generally recognized rejection of privilege before FOIA is found in the landmark case of Reynolds v. United States, 10 F.R.D. 468 (E.D. Pa. 1950), aff'd, 192 F.2d 987 (3d Cir. 1951), rev'd on other grounds, 345 U.S. 1 (1953). Reynolds was a Federal Tort Claims Act suit seeking recovery of damages arising from the crash of a

military aircraft. Judge Kirkpatrick ordered that the report and findings of the military investigation board and witness statements given by military personnel to the board must be produced. He specifically rejected the claim of privilege that Petitioner urges here:

> "In effect, the Government claims a new kind of privilege. Its position is that the proceedings of boards of investigation of the armed services should be privileged in order to allow the free and unhampered self-criticism within the service necessary to obtain maximum efficiency, fix responsibility and maintain proper discipline. I can find no recognition in the law of the existence of such a privilege. 10 F.R.D. at 472 (emphasis added).

The Third Circuit affirmed this ruling and held "that the district court rightly rejected the broad claim of privilege made by the United States not to produce any statements or reports regarding

airplane accidents." 192 F.2d at 998. Writing for that Court, Judge Maris eloquently explained why the Government's interest in shielding this material must yield to a free society's paramount interest in freedom of information. Id. at 994-995. And he further noted:

> "It may well be more convenient and efficient in the conduct of accident investigations for the [Air Force] Department not to be required to disclose statements and reports of this character. But the same would be true in the case of any private person and the latter do not ordinarily enjoy that privilege." Id. at 994.

This Court reversed the judgment of the Court of Appeals in Reynolds. The Court did not, however, review this ground relied upon by the Court of Appeals, but expressly decided only the alternative, "narrower ground" that discovery should not proceed because of the presence of military and state secrets.

United States v. Reynolds, 345 U.S. 1, 6-7, 10-11 (1953). The District Court's and Court of Appeals' analysis rejecting the privilege asserted by Petitioner herein was left untouched. Indeed, to the extent any Justice considered that analysis, it met with approval, since Justices Black, Frankfurter, and Jackson dissented in Reynolds "substantially for the reasons set forth in the opinion of Judge Maris below." 345 U.S. at 12.

2. Other Pre-FOIA Cases.

Reynolds was but one of several pre-FOIA cases ordering the disclosure of reports and witness statements generated in the course of military safety investigations of military aircraft accidents. In Cresmer v. United States, 9 F.R.D. 203, 204 (E.D.N.Y. 1949), the Court gave the following reason for

rejecting the assertion of "privilege" and ordering the disclosure of a Report of a Navy Board of Investigation:

> "In the absence of a showing of a war secret, or secret in respect to munitions of war, or any secret appliance used by the armed forces, or any threat to the National security, it would appear to be unseemly for the Government to thwart the efforts of a plaintiff in a case such as this to learn as much as possible concerning the cause of the disaster" (emphasis added).

See also United Air Lines, Inc. v. United States, 186 F. Supp. 824 (D. Del. 1960), later opinion, 26 F.R.D. 213 (D. Del. 1960) (statements of fact witnesses); O'Keefe v. Boeing Co., 38 F.R.D. 329, 334-335 (S.D.N.Y. 1965) (records of facts, including witness statements, made in air crash safety investigation).

3. Petitioner's Reliance Upon Machin v. Zuckert Is Misplaced.

Petitioner relies upon Machin v. Zuckert, 316 F.2d 336 (D.C. Cir. 1963), as the case that assertedly served as the basis for Congress' implicit recognition that witness statements like the ones at bar fall within Exemption 5. Machin did not extend a privilege, however, to statements -- such as those involved here -- taken from witnesses who are military personnel. The Machin court expressly declined to shield from disclosure such statements, and limited protection to the "testimony of private parties" and to such portions of the investigative report "reflecting Air Force deliberations or recommendations as to policies that should be pursued." 316 F.2d at 339-341. Machin can hardly serve as the implicit predicate for Peti-

tioner's assertion that, in passing FOIA, Congress gave recognition that witness statements of military personnel were not routinely available. No court -- not even the Machin court -- had yet extended the privilege that far. Congress, which obviously did not even discuss the so-called "Machin privilege" in its Reports or debates, should not be held to have done so silently.

II. THIS COURT SHOULD NOT ADOPT A SPECIAL PRIVILEGE FOR THESE WITNESS STATEMENTS TO EXEMPT THEM FROM FOIA.

As discussed above, the Court below correctly held that the asserted privilege which Petitioner asks this Court to recognize was not within the contemplation of Congress when it enacted FOIA. Petitioner argues in the alternative, however, that the asserted privilege is today "clearly recognized" and the

language of Exemption 5 is broad enough to include it. Petitioner fares no better on this point.

At the outset, for the Court to accept Petitioner's argument it must accept, on the merits, that there should be a special privilege extended for witness statements, concededly not taken in anticipation of litigation but in connection with military air crash safety investigations. See FTC v. Grolier, Inc., 462 U.S. ___, 103 S.Ct. 2209, 2214 (1983); id., 103 S.Ct. at 2218 (Brennan and Blackmun, JJ., concurring in part and concurring in the judgment). The existence vel non of this privilege was not passed upon by either Court below. Not only does this Court not have the benefit of decisions below, but also the Record is not properly developed to decide whether, or to what extent, these witness

statements should be shielded from civil discovery. In the circumstances, "[t]hat determination must await the development of a proper record," and a remand to the District Court for that purpose is appropriate. See, e.g., Federal Open Market Committee v. Merrill, 443 U.S. 340, 364 (1979).

A. Purely Factual Witness Statements Not Taken In Anticipation Of Litigation Are Generally Subject to Disclosure.

Generally, witness statements not taken in anticipation of litigation are required to be produced in discovery. E.g., Mercy v. County of Suffolk, 93 F.R.D. 520 (E.D.N.Y. 1982); Janicker v. George Washington University, 94 F.R.D. 648 (D.D.C. 1982); Miles v. Bell Helicopter Co., 385 F. Supp. 1029 (N.D.Ga. 1974) (accident reports made by employees

of airplane manufacturer); Thomas Organ Co. v. Jadranska Slobodna Plovidba, 54 F.R.D. 367 (N.D.Ill. 1972); Whitaker v. Davis, 45 F.R.D. 270 (W.D.Mo. 1968); 4 Moore's Federal Practice ¶ 26.64[2], at 26-414 to 26-415 & nn. 2-4 (2d ed. 1983). Even when such statements have been taken as part of Governmental investigations, they have routinely been available to parties in litigation. E.g., Roval Exchange Assur. v. McGrath, 13 F.R.D. 150 (S.D.N.Y. 1952); Wunderly v. United States, 8 F.R.D. 356 (E.D.Pa. 1948); see also Cooney v. Sun Shipbuilding & Drydock Co., 288 F. Supp. 708 (E.D.Pa. 1968). And witness statements have, moreover, been held not to fall within Exemption 5 of FOIA. E.g., Charlotte-Macklenburg Hospital Authority v. Perry, 571 F.2d 195, 198 n. 5 (4th Cir. 1978); Robbins Tire & Rubber Co. v. NLRB, 563 F.2d 724,

734-737 (5th Cir. 1977), rev'd on other grounds, 437 U.S. 214 (1978); see also NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 254 n.12 (1978) (Powell, with Brennan, JJ., concurring in part and dissenting in part).6/ There is no

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6/ "In light of my view of the limits of Exemption 7 (A), I reach the Board's alternative argument that the witness affidavits in dispute are protected against disclosure by Exemption 5. . . . I agree generally with the analysis of the Court of Appeals that the purpose of this Exemption is to protect agency litigation strategy and decisionmaking processes, and not to incorporate fully the 'work product' privilege recognized in Hickman v. Taylor, 329 U.S. 495 (1947), and Fed.Rule Civ.Proc. 26(b)(3). Our decision in NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 154-155, 159-160 (1975), provides support for this view. In this case, by contrast, the Board does not suggest that the witness affidavits in question are anything other than verbatim transcripts of statements made by witnesses to Board personnel."

The witness statements at bar were not even taken in anticipation of litigation,

(footnote continued)

greater public interest serving to shield the witness statements at bar than the interests served by those statements normally and routinely released. Indeed, the public's interests in ensuring that the Nation's military aircraft operate with maximum safety, that our military commanders responsibly discharge their responsibilities to promote safety and investigate the causes of mishaps, that our military personnel are properly trained and combat ready, and that the military services and its private contractors furnish the highest quality equipment, at reasonable cost, for our personnel, all commend the release of the statements to the public.

(footnote continued from previous page) as were the statements in Robbins Tire & Rubber Co., and thus are not "work product" of any kind.

B. The National Transportation Safety Board, Which For Civil Aviation Has Responsibilities Identical To Military Air Crash Safety Investigation Boards, Routinely Makes Available To The Public Witness Statements Taken In Its Investigations Of Civil Air Crashes.

The practice of the National Transportation Safety Board ("NTSB"), which is charged by law with investigating and determining the causes of civil air crashes, makes clear that there is absolutely no need to shield witness statements like the ones at bar from disclosure.

Congress established the NTSB in 1966 as a part of the Department of Transportation. 49 U.S.C. § 1901; see Public Law 89-670, 80 Stat. 935 (1966). In 1975, Congress found that the functions of NTSB, including those involving criticism of other agencies, could not be

properly performed unless the NTSB was totally separate and independent, and so it removed the NTSB from the Department of Transportation and made it an independent agency. 49 U.S.C. §§ 1901, 1902(a); see 49 C.F.R. § 800.2; see also S. Rep. No. 93-1347, 93d Cong., 2d Sess. 31, 1974 U.S. Code Cong. & Ad. News 7669, 7694.

The NTSB's mission is "to promote transportation safety by conducting independent accident investigations and by formulating safety improvement recommendations." 49 U.S.C. § 1901(1); 49 C.F.R. § 800.3(a). It is responsible for investigating and determining the facts, conditions, circumstances and the cause or probable cause of various specified types of accidents, including all accidents involving civil aircraft, and for developing measures designed to ensure

the safety of all modes of transportation, including air travel. See 49 U.S.C. § 1903(a); 49 C.F.R. § 800.3.

The statutory and regulatory scheme demonstrate that neither Congress nor the NTSB perceives a need to conduct aircraft accident investigations in secret. On the contrary, the public benefits from being deliberately made aware of the NTSB's work. As Senator Hartke, the sponsor of the bill establishing the NTSB as an independent agency, stated:

> "The great power that they [NTSB] have is that their information is transmitted to Congress and, therefore, it becomes a matter of consideration. Their information is transmitted to the public, which is certainly ultimately very vitally concerned, and will become more concerned." 120 Cong. Rec. 34081 (1974) (remarks of Sen. Hartke).

The NTSB's hearings are generally open to the public, with witnesses giving their testimony in the open. See 49

C.F.R. § 845.3. 49 U.S.C. § 1903(a)(2) requires the Board to:

> "report in writing on the facts, conditions, and circumstances of each accident investigated . . . and cause such reports to be made available to the public at reasonable cost and to cause notice of the issuance and availability of such reports to be published in the Federal Register."

See also 49 C.F.R. §§ 801.35, 845.40.

The NTSB's enabling legislation also requires it to make public all information it receives, with two exceptions not pertinent here, except to the extent such information is exempted from FOIA by 5 U.S.C. § 552(b), or is otherwise protected by law from disclosure to the public. 49 U.S.C. § 1905. As a matter of practice, the NTSB normally and routinely makes public its reports and its accident files, including witness statements. Its regulations state that

"it is the policy of the Board to make information available to the public to the greatest extent possible." 49 C.F.R. § 801.2; see also 49 C.F.R. § 801.10 and the Appendix to 49 C.F.R. Part 801. According to its regulations, the NTSB thus regards the release of these witness statements not to be inconsistent with the purposes of Exemption 5. See 49 C.F.R. § 801.50; see also 49 C.F.R. § 801.54(b).

The NTSB has been highly effective in achieving the goal of promoting safety in civil air travel. For the period from 1974 through 1979, the civilian accident rate per 100,000 aircraft hours flown for all civilian aircraft (including scheduled air carriers, general aviation, and unscheduled carriers) dropped from 0.77 to 0.40, a decrease of almost one-half (Appendix ("App.") infra, at 1a). For

the same period, the Air Force accident rate per 100,000 hours flown actually increased from 2.90 to 2.92. Id. Thus, the Air Force accident rate per 100,000 hours flown increased from 3.8 times the civilian rate in 1974 (2.90 v. 0.77), to 7.3 times the civilian rate in 1979 (2.92 v. 0.40).7/

When Air Force accident rates are compared with domestic scheduled airline accident rates (exclusive of general aviation and unscheduled carriers), the results are even more dramatic. The

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7/ It is difficult to obtain from publicly available sources comprehensive information about Air Force accident rates. Unlike the NTSB, which makes annual reports to the Congress, and which routinely publishes comprehensive information about accident rates, the Air Force publishes scant little information about its own accident rates.

The information reflected in the text above is based upon NTSB publications and the Air Force Inspector General's Listing of Class A Aircraft Mishaps per 100,000 flight hours for the years 1974 to September 1983.

accident rate per 100,000 hours flown for scheduled airlines decreased from 0.57 in 1975 to 0.23 in 1982. The Air Force accident rate per 100,000 hours flown was 2.80 in 1975, and 2.30 in 1982. Thus the Air Force accident rate per 100,000 hours flown was approximately 4.9 times higher than the scheduled airline rate in 1972 (2.80 v. 0.57), and a full 10 times higher than the scheduled airline rate in 1982 (2.30 v. 0.23). (App. 2a.)

The interests served by the NTSB are as compelling, if not more compelling, than the interests served by investigations into the causes of military air crashes. See FAA v. Robertson, 422 U.S. 255, 266-267 (1975). The NTSB has well served the public and these interests and has done so while making its work available for public scrutiny. Its record clearly demonstrates that the NTSB's

policy of releasing witness statements has in no way prevented the NTSB from greatly improving the safety record for civil air travel. There is no basis for Petitioner's speculative claim that the withholding of witness statements is necessary to promote the safety of military travel.

C. The Alleged Promise Of Confidentiality Extended To These Air Force Witnesses Does Not Confer Any Privilege Upon The Witness Statements Or Exempt Them From Disclosure Under FOIA.

Petitioner argues that these witness statements were received upon a promise of confidentiality. Such an alleged promise, however, is no justification for the special privilege Petitioner seeks.

Promises of confidentiality "cannot, in and of themselves, override [FOIA]." Robles v. EPA, 484 F.2d 843, 846 (4th

Cir. 1973); accord, e.g., Petkas v. Staats, 501 F.2d 887 (D.C. Cir. 1974). In any event, there is no evidence in this Record that the witnesses were given any specific promises of confidentiality, at any specified time, by any specified person, under any specified circumstances. The Record does not reflect where, when, by whom, to whom, or in what words such an alleged promise was made. The Record merely contains a broad statement that it is general Air Force policy to promise confidentiality (Pet. Br. 7), but this generalized policy simply does not speak to whether specific promises of confidentiality were made to the witnesses whose statements are involved herein. Petitioner's failure to document any specific promises of confidentiality is not insignificant, since this is a FOIA case where the matter is heard de novo, and "the burden

is on the agency to sustain its action." 5 U.S.C. § 552 (a)(4)(B).

Further, the Air Force could not, consistently with its regulations, make a blanket promise of confidentiality to any potential accident board witness. The Air Force Regulations require that witness statements be released in certain circumstances (see AFR 127-4, ¶ 2-5.d. (Pet. Br. 3a)); the Regulations even provide that "factual parts" of safety investigation reports (including witness statements that are attached) "must be released . . . [a]s required by the Freedom of Information Act" (AFR 127-4, ¶ 2-5.d. (Pet. Br. 3a)). AFR 127-4, ¶ 2-5.d.(3) (Pet. Br. 3a) requires that any person who is court martialed be furnished with all statements, sworn or unsworn, given to Federal agents, by any witness who testifies against the

accused. And AFR 127-4, ¶¶ 5-4.d. and 2-10.a.(2)(a) (App., infra, 3a-4a) provide that if the accident report names an Air Force employee as responsible for causing the accident, that person must be given the opportunity to review the entire accident report and submit a rebuttal statement. Thus the most that an Air Force employee could promise a potential witness, consistent with AFR 127-4, is that the witness's statement will be kept confidential, except as it may be required to be released, including by operation of FOIA. Such a "Catch-22" promise of confidentiality is no promise at all.

D. Accordingly, These Witness Statements Should Not Be Afforded A Special Exemption From Disclosure.

In view of the general rules and policies favoring disclosure, and the

lack of any distinguishing, practical reason for nondisclosure, the cases holding that these witness statements are not entitled to a special protection from disclosure represent the better view of the law. See cases cited supra at 34-38; see also McFadden v. Avco Corp., 278 F. Supp. 57, 60 (M.D.Ala. 1967). Witness statements such as those at bar normally are given at or near the time the crashes occur, and the public, the courts, and litigants -- no less than the military -- are entitled to accurate information on the causes of these incidents.

E. At The Very Least, The Law Commends Not Adopting Such A Privilege, Having Such Far-Reaching Consequences, Except Upon A Full Record That Is Absent Here.

The Machin privilege rests entirely upon a factual hypothesis: unless the

Air Force is able to promise witnesses confidentiality, it will fail to obtain important information about the causes of accidents, and will be unable to take appropriate corrective measures to prevent recurrence. Cooper v. Navy, 558 F.2d 274, 277 (5th Cir. 1977), on petition for rehearing, 594 F.2d 484 (5th Cir.), cert. denied, 444 U.S. 926 (1979); Brockway v. Dep't of Air Force, 518 F.2d 1184, 1191 (8th Cir. 1975); Machin, supra, 316 F.2d at 339. If that factual hypothesis is unsound, there would be no basis for the privilege.

The Court of Appeals expressly assumed the existence of a "Machin privilege" and held that, nonetheless, it was not subsumed within Exemption 5. 688 F.2d at 642. It did not decide whether or not the Machin privilege should be recognized in the Ninth Circuit, and there has been

no Record developed with respect to the putative basis for such a privilege. There has been no judicial scrutiny in this case as to whether the asserted grounds for the privilege in fact are justified.

This Court should not approve the Machin privilege without the benefit of an adequate Record. Many questions remain unanswered, and there is a need for full development of the facts. Does the Air Force in fact routinely advise witnesses before they are interviewed that their statements will not be used for any purpose except accident prevention? What is the specific text of the promise allegedly made? Does the Air Force advise witnesses of the provisions of its Regulations requiring disclosure of witness statements when persons testify at court martials, when mandated

by FOIA, or to military personnel named as having caused an accident? To whom are these witness statements disseminated?[8/] How important are such witnesses to Air Force investigations? (Much direct physical evidence, such as flight data recorders and cockpit voice recorders, is usually available to military investigators; witness accounts may not be as precise and may be less valuable to the military than Petitioner contends.) Would the information be

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8/ In Cooper, supra, 594 F.2d at 488-489 n.2, the Court of Appeals required the District Court to conduct a hearing with respect to the Navy's assertion of a privilege preventing the disclosure of a report of a Navy safety investigation into a helicopter crash. After the hearing, the Court found a limited waiver of the privilege because of the dissemination of the report beyond the Navy, in violation of the Navy's regulations. See also O'Keefe v. Boeing Co., 38 F.R.D. 329 (S.D.N.Y. 1966) (production allowed on alternative ground of waiver of alleged privilege, based upon disclosure of accident report to Boeing, the Government's prime contractor).

obtainable from witnesses absent any promise? (For example, when, as in this case, the witnesses are also members of the military, they may in certain circumstances be required to answer questions about their official duties, and discharged if they fail to do so. See, e.g., Lefkowitz v. Cunningham, 431 U.S. 801 (1977); Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation, 392 U.S. 280 (1968); Gardner v. Broderick, 392 U.S. 273 (1968)). Does the Air Force act promptly to implement the recommendations for corrective action contained in its accident reports? A Court asked to approve the Machin privilege is entitled to know whether the Air Force regularly implements, or disregards, those corrective action

recommendations for which these witness statements obstensibly are obtained.9/

The conclusory assertions in the Affidavits in this case have not been tested. Should this Court disagree with our positions that Congress did not intend purely factual material such as these witness statements to be exempt from FOIA under Exemption 5, or that the better view of the law is that no special privilege should be extended to these particular witness statements, there

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9/ The only issue presented to this Court involves the availability of witness statements; the availability to the public of other sections of the Air Force's formal accident report, such as the recommendations section, is not at issue here. Whether Exemption 5 extends to such other sections of the accident report presents additional legal issues that have not been briefed by the parties. See, e.g., 49 U.S.C. § 1906. Even if the content of such recommendations may not be disclosed, however, no reason appears why the Air Force's record of implementing or disregarding recommendations may not be examined through, for example, the use of statistical information.

should nonetheless be a full exploration in the District Court of the basis for the asserted "privilege," before this Court considers Petitioner's request for a special exemption from discovery.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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December 1983

APPENDIX

ACCIDENT RATES PER 100,000
AIRCRAFT-HOURS FLOWN

Year	U.S. Certificated Route and Supplemental Air Carriers (All Operations)	Air Force Class A Mishaps[1]
1974	0.77[2]	2.9
1975	0.67[2]	2.8
1976	0.43[3]	2.8
1977	0.36[3]	2.78
1978	0.35[3]	3.16
1979	0.40[3]	2.92

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[1] Taken from Air Force Inspector General Listing of Class A Mishaps from 1974 to September 1983. "Class A" mishaps are those resulting in (1) a total cost of $200,000 or more for injury, occupational illness, and property damages, or (2) a fatality, or (3) destruction of, or damage beyond economical repair to, an Air Force aircraft. AFR 127-4, ¶ 1-4a.

[2] Taken from 1976 NTSB Annual Report to Congress.

[3] Taken from 1979 NTSB Annual Report to Congress.

ACCIDENT RATES PER 100,000
AIRCRAFT-HOURS FLOWN

Year	U.S. Air Carriers Operating Under 14 C.F.R. 121 All Scheduled Service (Air Lines) [1]	Air Force Class A Mishaps [2]
1975	0.57	2.8
1976	0.39	2.8
1977	0.36	2.78
1978	0.35	3.16
1979	0.36	2.92
1980	0.22	2.73
1981	0.38	2.44
1982	0.23	2.3

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[1] Taken from attachments to NTSB Release No. SB-83-1, dated January 7, 1983.

[2] Taken from Air Force Inspector General Listing of Class A Mishaps from 1974 to September 1983.

Air Force Regulation 127-4 (Jan. 18, 1980) provides in pertinent part:

2.10. Notifying Persons Found Responsible for an Aircraft, Missile, or Nuclear Mishap. Use the following procedures for formal reports:

a. Military and Civilian Personnel Under Air Force Jurisdiction. When an Air Force person is named as a cause of one of these mishaps, he or she should have a chance to correct the record. This applies to the formal report, an indorsement by a reviewing commander, and the AF/IGD letter of final evaluation. Ask the involved individual to submit a statement of rebuttal or a statement declining rebuttal. (See attachment 4 for a suggested format.) The person must be advised that paragraph 3-8d applies to the statement of rebuttal and that the statement becomes an attachment to the mishap report. If the person found responsible is:

* * *

(2) Attached or assigned to another major command, the investigator(s) sends a copy of the report to the person's immediate commander. Attach a letter asking that commander to:

(a) Notify and give the person a chance to review the report.

* * *

5-4. Who Reviews the Formal Report. Mishap causes may require corrective actions by a number of organizations, both within and external to the chain of command. Therefore, the report is reviewed by the following:

* * *

d. Each person who has been named responsible for an aircraft, missile, or nuclear mishap. (See paragraph 2-10 for rebuttal procedures.)